IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-884

THE RIPON SOCIETY, INC., ET AL.,
Petitioners,

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT M. PENNOYER
THOMAS THACHER
PATTERSON, BELKNAP & WEBB
30 Rockefeller Plaza
New York, New York 10020
Counsel for Petitioners

Of Counsel:

GEORGE M. COBURN
1700 K Street, N.W.
Washington, D.C. 20006

WILLIAM J. MULLER
30 Rockefeller Plaza
New York, New York 10020

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

INDEX—Continued

CITATIONS

Cases:

CITATIONS—Continued

Constitutional Provisions:

Statutory Provisions:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. ——

THE RIPON SOCIETY, INC., ET AL.,
Petitioners,

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, The Ripon Society, Inc., David L. Allison, Robert D. Behn, Howard F. Gillette, Jr., Michael J. Halliwell, Katherine E. Sasseville, Tanya M. Silverman, Robert W. Sweet, George A. Vradenburg and Quincy White, respectfully pray that a writ of certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 30, 1975.

OPINIONS BELOW

Copies of the following opinions and judgments entered in this proceeding are included in the appendix hereto, cited as "*App.* ——."

1. The opinion and order of the United States District Court for the District of Columbia, Judge William B. Jones, entered on January 11, 1974. 369 F. Supp. 368. *App. 1, 17.*

2. The opinion and judgment of a division of the Court of Appeals entered and vacated on March 5, 1975, including the opinion for the court by Chief Judge Bazelon and a dissent by Senior Circuit Judge Danaher. —— F.2d —— (D.C. Cir.), Civil Nos. 74-1337 and 74-1358 (March 5, 1975) (slip op.). *App. 19, 59, 66, 67.*

3. The *en banc* opinion and judgment of the Court of Appeals, not yet reported, entered on September 30, 1975 (*App. 68, 171*), including the opinion for the court by Circuit Judge McGowan (*App. 69*); concurring opinions by Circiut Judges MacKinnon, Tamm and Wilkey (*App. 108, 109, 127*); a dissent by Senior Circuit Judge Danaher (*App. 159*); and a dissent by Chief Judge Bazelon, which alone adheres to the position taken by a division of the court in the opinion and judgment entered and vacated on March 5, 1975. *App. 148.*

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the decisions of the National Republican Party as to the apportionment of delegates to its national convention constitute state or governmental action and, if so, whether or to what extent principles of the political question doctrine counsel against judicial intervention.

2. Whether the allocation of delegates from the states and the District of Columbia to the national convention of the Republican Party is subject to the principles of

the reapportionment decisions and, if so, whether the system of awarding bonus delegates to states producing Republican victories in specified elections, included in the formula for apportionment of delegates to the 1976 Republican National Convention, violates the Equal Protection Clause of the Fourteenth Amendment, the Fifth Amendment and Article II, Section 1 of the Constitution.

3. Whether, although this case is not likely to be adjudicated in time to permit the Republican Party to adopt a new apportionment formula for the 1976 Republican National Convention, the continuing nature of the controversy requires declaratory and injunctive relief with respect to the use of the victory bonus system before the 1976 Republican National Convention adopts the delegate apportionment formula for the 1980 Republican National Convention.

4. Whether The Ripon Society, Inc., in addition to its nine members whose standing as plaintiffs was affirmed by the Court below, has standing to bring this action.

STATEMENT OF THE CASE

This petition is part of a continuing challenge, now entering its fifth year, to the victory bonus system used by the Republican Party in the allocation of delegates to the 1976 Republican National Convention.

The petitioners, plaintiffs below, referred to herein collectively as "Ripon," are The Ripon Society, a Republican research and policy organization, and nine members of the Society who are qualified Republican voters in California, Illinois, Indiana, Massachusetts,[1] Minnesota, New Jersey, New York, or the District of Columbia.

The respondents are the National Republican Party and the Republican National Committee which has "the

[1] After judgment of the District Court plaintiff Behn changed his residence from Massachusetts to North Carolina. *App. 74 n.8.*

general management of the affairs of the Republican Party in the United States and its territories subject to direction from time to time of the National Convention." [2]

The action was commenced in December 1971. The complaint alleged that the Republican Party's system of apportioning bonus delegates to its national convention to states producing Republican victories results in invidious discrimination against Republicans of different states and regions in violation of the Equal Protection Clause of the Fourteenth Amendment, the Fifth Amendment and Article II, Section 1 of the Constitution of the United States. It sought declaratory and injunctive relief with respect to the victory bonus system and the standards to be used in the apportionment of delegates to the 1976 Republican National Convention. Jurisdiction was invoked under 28 U.S.C. § 1343(3) and (4) and the civil rights statutes, 42 U.S.C. §§ 1983, 1985(2) and (3), and 1988. *Joint Appendix 58a, 70a.*

Prior to the 1972 Republican National Convention the District Court granted plaintiffs partial relief, declaring that the allocation of a uniform number of bonus delegates to states qualifying for them, in the context of a formula which allocates the remaining delegates in proportion to each state's share of the Electoral College vote, violates the Equal Protection Clause, but that a bonus system which rewards states producing Republican victories by allocating a number of delegates reasonably proportionate to the Electoral College vote or the number of Republican votes which produced the victory would have a constitutionally rational basis. 343 F. Supp. 168, 177-78 (D.D.C. 1972). The court also enjoined the Republican Party from adopting a formula for the 1976 Convention which included the proscribed uniform victory bonuses. *Id.* at 178.

---

[2] Rule 19 of the Rules adopted at the 1972 Republican National Convention. See Page 151a of the Joint Appendix filed below, cited herein as *"Joint Appendix ——."*

Three days before the 1972 Republican National Convention convened Justice Rehnquist stayed the District Court order. *Republican State Central Committee of Arizona* v. *Ripon Society*, 409 U.S. 1222 (1972).

By a vote of 910 to 434, the 1972 Convention, following the recommendation of the Republican National Committee and the Rules Committee of the Convention, adopted a formula for the apportionment of delegates to the 1976 Convention ("the 1976 Formula") which includes both uniform and proportional victory bonuses.

Thereafter Ripon amended its complaint to challenge the victory bonus system included in the 1976 Formula. The District Court denied a motion to intervene as plaintiff by the Republican State Committee of Pennsylvania on the ground that its interests were adequately represented by Ripon, and again enjoined the use of uniform victory bonuses but upheld the formula in other respects. 369 F. Supp. 368, 376 (D.D.C. 1974), *App. 17-18.* Both sides appealed. On July 31, 1974, after all briefs had been filed, Ripon moved to advance the argument because of the need to secure timely adjudication. The Republican Party did not join in this motion.

On March 5, 1975, Chief Judge Bazelon writing for a majority of a division of the Court of Appeals reaffirmed the court's earlier holdings in *Georgia* v. *National Democratic Party*, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971), and *Bode* v. *National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971), *cert denied*, 404 U.S. 1019 (1972), that the court has jurisdiction and that the case involves state action and is justiciable. *App. 19, 25-34.* He also ruled uniform and proportional victory bonuses unconstitutional *in toto* and would have enjoined their use for the 1976 Convention. *App. 23, 34-55.* The division judgment was vacated and the case set for reargument before the court *en banc. App. 67.*

On September 30, 1975, following reargument the Court of Appeals entered its *en banc* opinion and judgment

reversing the judgment of the District Court and remanding with directions to dismiss the complaint. *App. 68, 107, 171.* Without deciding the threshold questions of jurisdiction, state action and justiciability, the *en banc* opinion by Judge McGowan concludes that the Republican Party's right of association under the First Amendment deserves greater protection than the rights of voters in the Presidential nominating process, and that the Equal Protection Clause, assuming it is applicable, "is satisfied if the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *App. 101-02.* As summarized below, the result sanctions disparities in convention representation which far exceed the disparities reflected in the Electoral College apportionment.

The Party's formula for apportioning delegates to the 1976 Republican National Convention

The text of the rule containing the 1976 Formula is reproduced in the District Court opinion. 369 F. Supp. at 370-71, *App. 4-5 n.3.*

Based on the 1972 election results the 1976 Convention will include a total of 2,242 delegates from the states, the District of Columbia and the territories. *Exhibit A, App. 177-80.*

1,605 delegates, or 72%, are apportioned to the states on the basis of three delegates for each member of the Electoral College. This gives a basic delegation of nine to each of the smallest states which has three members in the Electoral College, and a basic delegation of 135 to the largest, California, with 45 Electoral College members.

295 delegates, or 13%, are apportioned to the states on the basis of *uniform* victory bonuses which award up to nine additional delegates to each state regardless

of size: 4.5 delegates (rounded to 5) to each of the 49 states which cast its Electoral College vote for the 1972 Republican nominee, and one additional delegate (but no more than 4) to each state which in 1972 or thereafter elected a Republican Senator, Governor or a majority of the state's Representatives in the House.

312 delegates, or 14%, are apportioned to the states on the basis of a *proportionate* victory bonus equal to 60% of the Electoral College vote of each of the 49 states carried by the Republican nominee in 1972.

Of the remaining 1%, 14 delegates are allocated to the District of Columbia, 8 to Puerto Rico and 4 each to Guam and the Virgin Islands.

The disparities that will result from the use of the 1976 Formula at the 1976 Convention

Statistics in the record confirm that the victory bonuses cause disparities in representation which, measured by population and party vote, vastly exceed the disparities reflected in the Electoral College apportionment.[3] The District Court having decided the case on cross motions for summary judgment, these statistics are undisputed.

The *uniform* victory bonuses which could give each state, regardless of size, up to 9 additional delegates would provide a 100% increase in the basic delegation of each of the six least populous states, but only a 6.7% increase for California's basic delegation of 135 and a 7.3% increase in New York's basic delegation of 123. The *proportionate* victory bonus, equal to 60% of the Electoral College vote of each state qualifying for the bonus, will increase the basic delegation of every state

---

[3] The record below shows the disparities that will occur at the 1976 Republican National Convention on the basis of the 1972 election results. It does not reflect the results of elections since 1972, which could give up to three additional bonus delegates to any state electing a Republican Governor, Senator or Republican majority to its seats in the House since 1972.

except Massachusetts by 20% to 22%. (*E.g.*, a state with three Electoral College votes and a basic delegation of nine will be entitled to a bonus of 1.8 delegates which, when rounded up to 2, will equal a 22% increase.)

This victory bonus system will result in the following disparities in representation at the 1976 Convention:

50% of the delegates will be apportioned to states which have 45.9% of the Electoral College vote and 38.9% of the population, and cast 38.6% of the Republican Presidential vote in 1972. *Exhibit E, App. 187-88.* The eight most populous states[4] will be alloted 39.1% of the delegates to the 1976 Convention although they have 42.4% of the Electoral College vote and 48.7% of the population, and cast 48.6% of the Republican vote in 1972. *Exhibit F, App. 189.*

A glance at the statistical tables reproduced from the record in the appendix hereto[5] confirms that the disparities in the population and 1972 party vote represented by delegates at the 1976 Convention will vastly exceed the disparity in population represented by members of the Electoral College.

---

[4] California, New York, Pennsylvania, Texas, Illinois, Ohio, Michigan and New Jersey.

[5] As noted in the vacated division opinion (*App. 24, 36 n.26*) the record in the District Court did not include schedules comparing the deviations from mean population and party vote represented by delegates from each state and the District of Columbia, or the deviations from mean population in their Electoral College representation. Based on undisputed statistics in the record schedules listing such deviations were prepared and filed below prior to reargument before the Court of Appeals sitting *en banc*, and are included as exhibits in the appendix hereto. Judge Bazelon's dissent comments on the significance of such data. *App. 148 n.2.*

Each exhibit listing deviations from mean lists the states in the same order—in the order of their deviations from mean population in the Electoral College.

Maximum disparities in representation at the 1976 Convention, *Exhibits B and C, App. 181, 183*

	1972 vote per delegate
District of Columbia	2,515
Florida	28,148
Ratio	11.19 to 1

	Population per delegate
Alaska	17,775
Massachusetts	132,306
Ratio	7.44 to 1

Maximum disparity in the Electoral College, *Exhibit D, App. 185*

	Population per E.C. member
Alaska	100,724
New York	443,677
Ratio	4.4 to 1

Deviations from mean in the representation awarded different states and the District of Columbia at the 1976 Convention and in the Electoral College, *Exhibits G and H, App. 190, 192*

	In the Electoral College: Population	At the 1976 Convention: Party Vote	At the 1976 Convention: Population
Average deviation	±22.2%	± 29.3%	± 29.3%
Largest over-representation	73.3%	88.1%	80.5%
Largest under-representation	—17.5%	— 33.2%	— 45.0%
Maximum deviation	90.8%	121.3%	125.5%

Massachusetts, which cast 45% of its vote for the Republican nominee in the 1972 election, was the only state which did not qualify for the Presidential bonuses. Its representation at the 1976 Convention will deviate by —45.0% from mean population and —22.4% from mean party vote, compared to the —7.6% deviation from mean population in its Electoral College representation. *Exhibits G and H, App. 190, 192.*

The disparities that would result from the use of the 1976 Formula following an election in which the Republican ticket does not carry a number of states.

To show the effect of the victory bonus system where a number of states do not qualify for the Presidential bonuses, Ripon filed undisputed statistics confirming the disparities that would have resulted had the 1976 Formula been used for the 1972 Convention where the apportionment would have depended on the results of elections from 1968 to 1971, including the 1968 Presidential election in which the Republican nominee carried only 32 states. *Exhibit I, App. 194-97.*

The disparities in population and 1968 party vote represented by delegates at the 1972 Convention would have vastly exceeded the disparities in population represented by members of the Electoral College (*Exhibits H, J and K, App. 192, 198, 200*):

	In the Electoral College: Population	At the 1972 Convention: Party Vote	At the 1972 Convention: Population
Average deviation	±22.2%	± 36.7%	± 32.3%
Largest over-representation	73.3%	86.6%	83.2%
Largest under-representation	—17.5%	— 61.0%	— 45.5%
Maximum deviation	90.8%	147.6%	128.7%

There would have been horrendous disparities between states with similar representation in the Electoral College.

California has 45 Electoral College votes, or some 10% more than New York's 41. This results in almost identical deviations from mean population of —17.4% and —17.5%, respectively. *Exhibit H, App. 192.* In 1968 California and New York cast 47.8% and 44.3% of their votes for the Republican Presidential nominee.[6]

[6] For the 1968 election results, see *Joint Appendix 170a.*

The Republican ticket carried only California. Use of the 1976 Formula would have caused the following disparities in representation between California and New York (*Exhibits I, J and K, App. 194, 198, 200*):

	California	New York	Difference
Number of delegates	168	125	30%
Deviation from mean population	—18.8%	— 45.5%	26.7%
Deviation from mean party vote	— 32.0%	— 53.8%	21.8%

The Electoral College apportionment of 10 votes to Minnesota and 12 votes to Virginia results in deviations from mean population of —0.8% and —2.6%, respectively. *Exhibit H, App. 192.* In 1968 Minnesota and Virginia cast 41.5% and 43.4% of their votes for the Republican ticket, which carried Virginia. Based on the 1976 Formula there would have been the following disparities in representation between Virginia and Minnesota (*Exhibits I, J and K, App. 194, 198, 200*):

	Virginia	Minnesota	Difference
Number of delegates	50	31	61%
Deviation from mean population	7%	—22.8%	29.8%
Deviation from mean party vote	24.5%	—35.8%	60.3%

Even if the uniform victory bonuses had been eliminated from the 1976 Formula, leaving only the proportional victory bonus of 60% of the Electoral College vote for each state which carried for the Republican ticket in 1968, the representation accorded New York would have deviated from the mean by —32.1% in population, a disparity of more than 22 percentage points from the —10.0% population deviation for California, and by —39.6% in party vote, a disparity of more than 17 percentage points from the —22.2% party vote de-

viation for California; and the representation accorded Minnesota would have deviated from the mean by —13.3% in terms of population, a disparity of 18.9% percentage points from the +5.6% population deviation for Virginia, and by —25.4% in terms of party vote, a disparity of 48.8 percentage points from the +23.4% party vote deviation for Virginia. *Exhibits L and M, App. 202, 204.*

Chief Judge Bazelon summarized the disparities documented by the record and concluded that the deviations resulting from the 1976 Formula "are far in excess of the deviations permitted" in reapportionment decisions of this Court. *App. 23-25, 35, 148 n.2.* The *en banc* opinion makes no reference to these disparities other than to state that "[p]laintiffs have repeatedly stressed that particular states and regions are favored under the formula." *App. 105 n.64.*

REASONS FOR ALLOWANCE OF WRIT

I. The decision below rules on constitutional issues expressly reserved by this Court in *Cousins* v. *Wigoda*, and leaves the law on delegate apportionment in utter confusion.

This case raises questions on which this Court intimated no view in *Cousins* v. *Wigoda*, 419 U.S. 477 (1975):

> "(1) whether the decisions of a National Political Party in the area of delegate selection constitute state or governmental action, and, if so, whether or to what extent principles of the political question doctrine counsel against judicial intervention. . . .
> "(2) whether national political parties are subject to the principles of the reapportionment decisions, or other constitutional restraints, in their methods of delegate selection and allocation. . . ." 419 U.S. at 483-84 n.4.

The highly important questions reserved in *Cousins* and raised by this case are ripe for decision by this

Court. The decision below leaves the law on the applicability of the principles of the reapportionment decisions to delegate apportionment in utter confusion.

In 1968 the Eighth Circuit held that a state political party may select national convention delegates through a malapportioned state convention system. *Irish* v. *Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119 (8th Cir.), *aff'g* 287 F. Supp. 794 (D. Minn. 1968); and the District Court for the Northern District of Georgia declined to declare a major party's procedures for selecting delegates to a national convention invalid but "admonished" the Democratic State Committee to consider prospective changes which would afford equal protection. *Smith* v. *State Executive Committee*, 288 F. Supp. 371, 377 (N.D. Ga. 1968). The result in both cases was affected by the imminence of the national convention and the inability to grant prospective relief for that convention. In *Irish* the District Court also noted that it was presented with a ". . . challenge to the middle echelon of . . ." the presidential election process and that "[w]hatever might be done by this court could have little effect on the entire process . . ." because the ". . . court has no control over the National Democratic party. . . ." 287 F. Supp. at 803.

Since 1968, except for the decision below, Federal courts have consistently held that the one man, one vote principles of the reapportionment decisions apply to delegate apportionment to state and national conventions. *Maxey* v. *Washington State Democratic Committee*, 319 F. Supp. 673 (W.D. Wash. 1970); *Doty* v. *Montana State Democratic Central Committee*, 333 F. Supp. 49 (D. Mont. 1971); *Barthelmes* v. *Morris*, 342 F. Supp. 153 (D. Md. 1972) (declining relief because of laches). In *Redfearn* v. *Delaware Republican State Committee*, 502 F.2d 1123 (3rd Cir. 1974), although one Third Circuit judge ruled that malapportionment by a political party to achieve its objectives would be permissible, on

remand the District Court declared that the one man, one vote principle is applicable to state delegate apportionment. 393 F. Supp. 372 (D. Del. 1975). In two 1971 decisions the court below held the one man, one vote principle applicable to national convention apportionment. *Georgia* v. *National Democratic Party* and *Bode* v. *National Democratic Party, supra.* The Second Circuit also held a political committee's nominating procedures for party candidates subject to the one man, one vote principle, affirming the distinction between "internal" party affairs and party nominations. *Seergy* v. *Kings County Republican County Committee,* 459 F. 2d 308 (2nd Cir. 1972).

In applying the principles of the reapportionment decisions to this case the vacated opinion of the division below was therefore consistent with every reported decision by a Federal court since 1968 bearing on delegate apportionment. Adjudication by this Court as to the application of reapportionment principles to a major party's national convention is thus essential to ensure consistency among circuits in decisions involving delegate apportionment.

The only pending case which the court suggests might bear on the resolution of the issues in this case is *Buckley* v. *Valeo,* —— F.2d —— (D.C. Cir. 1975) appeal docketed, 44 U.S.L.W. 3162 (U.S. Sept. 19, 1975) (Nos. 75-436, 75-437), challenging provisions of the Federal Election Campaign Act Amendments of 1974. See *App. 80-81,* and *cf.* the comment in Chief Judge Bazelon's dissent, *App. 158 n.18.* It is clear, however, that the issues raised by this case are of such overriding national importance as to require resolution by this Court irrespective of the disposition of that case.

The voluminous opinions of the lower courts, as well as the complete record and extensive briefing below, give assurance that this case is unusually well prepared for review by this Court.

II. By sanctioning the Republican Party's victory bonus system the decision below has eviscerated the proportionality mandated by Article II, Section 1 of the Constitution.

The major fallacy in the decisions below, which permeates the result reached and every step in the court's analysis, stems from a common defect—the failure to grasp and apply the modified proportionality mandated for the Presidential election by Article II, Section 1 of the United States Constitution, which provides that "Each State shall appoint, in such Manner as the Legislature may direct, a number of Electors, equal to the whole Number of Senators and Representatives. . . ."

It is the thesis of Ripon's case and the thrust of the vacated division opinion (*App. 45 and id. at n.46*) that, although the Republican Party may legitimately employ standards which reflect *relative* differences in the party strength of each state and the District of Columbia, the use of a victory bonus system or other delegate apportionment standards which are completely at odds with the proportionality mandated for the Electoral College deprives the citizens of this nation of political rights secured by Article II, Section 1 and the Equal Protection Clause, and that federal courts may intrude in the party's apportionment decisions to the limited extent required to foreclose the use of such standards.

Wesberry v. *Sanders,* 376 U.S. 1 (1964) held that the requirement of Article I, Section 2 of the Constitution that representatives be chosen "by the People of the several States" mandates that "as nearly as is practicable one man's vote in a Congressional election is to be worth as much as another's." 376 U.S. at 8-9. Analogous reasoning supports the conclusion that the use of apportionment standards for a national nominating convention which defy the modified proportionality reflected in the Electoral College would deprive the citizens of the several states of political rights secured to the people

of this nation by Article II, Section 1, and defeat another principle solemnly embodied in the Great Compromise upon which our government was founded.

It is an accident of history that the fundamental principles of the reapportionment decisions were developed in cases involving elections within a single state. In several of these cases the proponents of malapportionment tried to use the federal analogy to justify territorial discrimination. *Reynolds* v. *Sims* rejected the "[a]ttempted reliance on the federal analogy . . . [as] little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements." 377 U.S. 533, 573 (1964). *Gray* v. *Sanders* rejected an attempt to use the Electoral College analogy to justify weighted voting in a party primary within a single state. 372 U.S. 368, 378 (1963).

Now that we have a federal case the Republican Party wants to disregard Article II, Section 1, contending below that the standard for determining whether a delegate apportionment formula meets constitutional requirements is found in the Twelfth Amendment which, in the event of a deadlock in the Electoral College, leaves the election of the President to the House where each state casts one vote. The decision below reaches the same result by sanctioning the use of a victory bonus system which is completely at odds with the proportionality mandated for the Presidential election by Article II, Section 1.

It is important to emphasize that mathematical equality cannot be the objective of delegate apportionment to a national convention. Ripon has never contended otherwise. The Electoral College justifies a limited and measurable disparity in favor of each of the smaller states. The Democratic Party's use of a delegate apportionment formula combining elements of party vote and the Electoral College apportionment was upheld by the court below in *Bode*. 452 F.2d at 1307-10. The Republican

Party clearly has wide discretion to use apportionment standards which have a rational relationship to the possible constituency in each state and the District of Columbia and reflect variations in party strength so long as such standards are not wholly incompatible with the modified proportionality reflected in Article II, Section 1.

In state districting this Court has recognized that apportionment is essentially a political process, and that judicial interest should be at its lowest ebb where a state, within the limits of the population equality standards of the Equal Protection Clause, purports "fairly to allocate political power to the parties in accordance with their voting strength. . . ." *Gaffney* v. *Cummings*, 412 U.S. 735, 754 (1973). The same principles apply with even greater force to national convention apportionment where the constituency to be represented cannot be judicially defined by any one standard. Permitting the party wide discretion as to the choice of elections by which to measure party strength, and as to the weight to be assigned to each element of the formula, will not satisfy any single one man, one vote standard, but will preserve the proportionality mandated by Article II, Section 1 and result in deviations which, when measured by both party vote and population, are no greater than those reflected in the Electoral College apportionment.

The Republican Party asserted below that no "formula is possible which will not produce such inequities" which result from the victory bonus system. *Joint Appendix 228a, 231a.* To demonstrate the fallacy of such a claim, Ripon introduced two sample formulas combining elements of Electoral College apportionment and party vote in recent elections. Both samples result in deviations which, when measured by both population and party vote, do not exceed the deviations reflected in the Electoral College apportionment. *Joint Appendix 303a-316a*, and Ripon's *Memorandum pursuant to Order of March 19, 1975, Schedules 5 and 6.*

The point was *not* to require the Party to use either formula but to show that the Party would have no difficulty structuring a formula which allows for variations in party strength without destroying the proportionality mandated by Article II, Section 1.

III. The rulings made or reserved by the court below with respect to the threshold questions and the merits clearly conflict in principle with the reapportionment decisions of this Court.

A. *State Action.*

The court below reserves decision on the question whether a major party's decision with respect to the apportionment of delegates to a national convention involves state action (*App. 77-81*), withdrawing from its holdings in *Bode* and *Georgia*, where the court had cited decisions of this Court demonstrating that "it makes no difference for purposes of finding state action that the state party acts through a statewide primary, a state party convention, or a state party committee." 447 F.2d at 1275 and *id.* at n.6, citing *United States* v. *Classic*, 313 U.S. 299 (1941) (party primary); *Gray* v. *Sanders*, 372 U.S. 368, 374-75 (1963) (party primary); *Smith* v. *Allwright*, 321 U.S. 649 (1944) (state convention); *Nixon* v. *Condon*, 286 U.S. 73 (1932) (state committee).

As the basis for its uncertainty the opinion below cites the intervening decisions of this Court in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) and its concern that the "nexus" between the states and the delegate allocation formula is open to question, particularly in light of *Cousins*, where this Court held that an individual state is without power to interfere with the delegate selection procedures of a national convention. *App. 78.*

In relying on *Moose* and *Jackson* the court below failed to note, as Judge Bazelon's dissent points out

(*App. 150-51*), that this Court explicitly distinguished cases where it had "found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. See, *e.g.*, *Nixon* v. *Condon*, 286 U.S. 73 (1932) (election); *Terry* v. *Adams*, 345 U.S. 461 (1953) (election). . . ." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 352. *Nixon* v. *Condon* and *Terry* v. *Adams*, both involved racial discrimination in party primaries. *Terry* found state action in a party's primary even where the primary was not mandated by the state's election laws. 345 U.S. at 469.

The court's reliance on *Cousins*, where this Court expressly reserved the question of state action, is misplaced. The same national interest in the effectiveness of the party's national convention which secures the party's process for resolving delegate seating contests from interference by a single state (*Cousins*) or by a federal court (*O'Brien* v. *Brown*, 409 U.S. 1 (1972)) makes essential limited intervention in the party's decision with respect to delegate apportionment to prevent the use of apportionment standards completely at odds with Article II, Section 1 of the Constitution.

The court below refuses to recognize that Article II, Section 1 is the source of the state action in a party's decision with respect to delegate apportionment, stating only that if Article II, Section 1 has "any force at all beyond its specific commands, it also is confined to the federal government." *App. 77 n.16.* This conflicts with decisions of this Court which make clear that "the appointment and mode of appointment of electors belong exclusively to the states . . .", *McPherson* v. *Blacker*, 146 U.S. 1, 35 (1892); that there "can be no question but that . . . [Article II, Section 1] does grant extensive power to the States to pass laws regulating the selection of [Presidential] electors" and that "tnese granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific

provisions of the Constitution", *Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968); and that a party's adoption of rules governing the selection of its Presidential candidates, at least to the extent of requiring a loyalty oath of its candidates for Presidential elector, "is an exercise of the state's right [under Article II, Section 1] to appoint electors in such manner, subject to possible constitutional limitations, as it may choose." *Ray* v. *Blair*, 343 U.S. 214, 227 (1952).

B. *Jurisdiction.*

The court below reserved decision on the question of jurisdiction over the subject matter. *App. 81-82 n.26.* There can be no question as to the court's jurisdiction in view of the formulation in *Baker* v. *Carr*, 369 U.S. 186 (1962), which made clear that under 28 U.S.C. § 1343(3), one of the jurisdictional statutes relied on by Ripon, Congress has assigned jurisdiction over equal protection claims by voters to the District Courts, citing an "unbroken line of our precedents" which sustain "the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature." 369 U.S. at 201.

This case also involves voting rights. The individual plaintiffs include qualified voters from the District of Columbia and seven states, all but one of which (Minnesota) require or permit a party primary in connection with its Presidential selection process in 1976. Every state has chosen to select its Presidential electors by popular election. *See, McPherson* v. *Blacker, supra.* Eighteen states and the District of Columbia mandate primary elections for the selection of delegates to national conventions. Twenty states provide the major parties with the option of choosing either a primary or convention to select their delegates.[7] The right to vote in

[7] *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1153-54 (1975).

a direct primary "is protected just as is the right to vote at the election. . . ." *United States* v. *Classic*, 313 U.S. at 318. Participation by voters in the Presidential election process will be rendered meaningless if the party is permitted to apportion delegates to its national convention on the basis of standards bearing absolutely no relationship to the Electoral College apportionment which determines the weight of their vote in the general election.

C. *Justiciability.*

The contradiction between the decision below and the principles of the reapportionment cases is nowhere more apparent than in the court's conclusion with respect to the justiciability of the issues presented by this case, and its conclusion that the party's apportionment of a national convention will meet the requirements of the Equal Protection Clause if "the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *App. 101-02.*

By sanctioning the victory bonus system the decision below permits unrestrained territorial discrimination vastly in excess of the disparities reflected in the Electoral College apportionment. As such it is completely at odds with the theme of equality in this Court's reapportionment decisions, which hold that restrictions on the right to vote "strike at the heart of representative government," and that "the right of sufferage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. at 555. This Court has consistently applied the theme of equality to the selection of Presidential electors within a single state, holding that there is no invidious discrimination if the electors "are elected in districts where each citizen has an equal right to vote. . . ." (*McPherson* v. *Blacker*, 146 U.S. at 40) and that a state

may not structure its nominating petition requirements for independent candidates for Presidential elector so as to discriminate against more populous regions of the state. *Moore* v. *Ogilvie*, 394 U.S. 814, 819 (1969). The vacated division opinion's analysis is fully consistent with this root principle of the reapportionment cases. *App. 41-55.*

The decision below concedes that *Gray* v. *Sanders*, is "clearly the Supreme Court case most closely in point," and that there is "no persuasive distinction" between a primary and nominating convention, at least where the "convention delegates are bound by primary votes," or between "nominations at the state rather than the national level." *App. 106 n.65.* Nevertheless, it purports to distinguish *Gray* on the basis that the primary in *Gray* involved an election in a one party state and was mandated by a state statute. *Id.* No authority is cited for these distinctions, and they are inconsistent with the principles applied by this Court. Even where the two major parties field candidates, nominating petition requirements for independent candidates for Presidential elector which discriminate against more populous regions of a state will be struck down, *Moore* v. *Ogilvie*, and a political party may not engage in racial discrimination in its primary even where the primary system is not mandated by state statute. *Terry* v. *Adams*, 345 U.S. 461 (1953).

Applying a dual standard to racial and territorial discrimination (*App. 105*) results in a clear conflict with decisions of this Court which have held that territorial discrimination is no less invidious than racial. *Reynolds* v. *Sims*, 377 U.S. at 566; *and see Gray* v. *Sanders*, 372 U.S. at 380. And by making the party's associational rights paramount to those of the electorate, the court below has given the party a license to engage in territorial discrimination which this Court has denied to a state legislature and even to the majority of a state's

electorate. *Reynolds* v. *Sims*, 377 U.S. at 561-63; *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736 (1964); *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969).

The decision below seems to equate the "manageable standard" test of justiciability with the need to impose strict equality on some one man, one vote standard. *App. 83-84.* It is obvious that the rigor of the rules established for congressional and state districting is wholly inappropriate here, where the fairness of an apportionment cannot be tested by adherence to any single standard. It is equally obvious that, subject to the addition of two votes for each state's Senators, the Electoral College assures the electorate of each state a proportionate voice in the general election; that the greater importance of the smaller states is measurable; and that a court would have no difficulty in making the determination that the victory bonus system, or other standards which are completely at odds with the modified proportionality reflected in the Electoral College, results, following this Court's formulation on justiciability in *Baker* v. *Carr*, in "a discrimination [that] reflects *no* policy, but simply arbitrary and capricious action." 369 U.S. at 226.

D. *The Merits.*

Having in effect relieved itself from the need to apply any standard, the court below merely considered whether the victory bonus system "rationally advance[s] some legitimate interest of the party in winning elections or otherwise achieving its political goals." *App. 101-02.* The justifications given for finding such rationality are contradicted by both reason and history.

The court below states that the victory bonus system "has the effect of making delegate apportionment more reflective of party strength than it would be if based on electoral college vote alone." *App. 92 n.42.* The District Court had no difficulty ruling, and did so twice, that

uniform victory bonuses which increase the basic delegation of any of the least populous states by 100%, but increase California's delegation by only 6.7%, are not a rational means of promoting party strength. *App. 12.* Nor is the proportional victory bonus, which increases the basic delegation of qualifying states by 20%, reflective of party strength because there is no correlation between the bonus and the percentage vote by which party candidates win or lose, and no correlation between victory in one election and the next. The most superficial examination of recent elections will reveal that there is simply no substance to the statement that "[a] state which has gone Republican in the past may do so again." *App. 103.*

Of the 26 states carried by the Republican nominee in 1960, only one was carried in 1964.[8] Of the 6 states carried by the Republican nominee in 1964, only 2 were carried in 1968. Of the 44 states which were not carried by the Republican nominee in 1964, only 14 were not carried in 1968. Of the states which carried for the Republican nominee in 1968, all did so again in 1972, but so did all but one of the 18 states which did not carry for the Republican nominee in 1968.

The court below ignores history when it states that it is unable to conclude that treating states on a uniform basis does not rationally serve the cause of cohesiveness among the state parties because "it took precisely such a scheme to bring about the union of the states themselves." *App. 105.* As this Court has made clear, the issue between the proponents of proportional representation and the proponents of uniform treatment of the states percipitated the most bitter controversy of the Constitutional Convention, and was resolved only by the

[8] For the Electoral College vote cast in elections from 1960 to 1968, see NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES 7 (Government Printing Office 1972).

Great Compromise which assured representation in proportion to population except in the Senate and the Electoral College, where limited deviations in favor of smaller states resulted in limited variations from strict proportionality. *Wesberry* v. *Sanders*, 376 U.S. at 10. It is inconceivable that such limited variations from strict proportionality can be equated with uniform treatment of the states. Nor is it relevant that the Twelfth Amendment awards each state an equal vote, because its procedures come into play only in the event of a deadlock in the Electoral College.

The enormity of the error in sanctioning any apportionment purporting to serve the Party's interests is apparent in the disproportionate allocation of delegates to the District of Columbia. By failing to address the reasons set forth in the record for that allocation, the court below has given tacit sanction to the justifications advanced by the Party for the disproportionate allocation, which include the "special burdens imposed by virtue of being a protest site . . ." and "large financial contributions to the Party." *Joint Appendix 292a.* If such reasons justify malapportionment for one jurisdiction, nothing would prevent their use by the Party for the nation at large, with consequences which would be destructive of liberty and order in this nation.

IV. Even if the timing forecloses relief for the 1976 Convention, the continuing controversy makes declaratory and injunctive relief essential.

From the inception of this case in 1971 Ripon has sought declaratory and injunctive relief with respect to the use of the victory bonus system in the 1976 Formula. If that formula had been finally adjudicated unconstitutional before October 31, 1975, the Republican National Committee would have had authority, under the rules adopted by the 1972 Convention, to effect its revision. Rule 30, Section A.8, *App. 4-5 n.3.* Once the

call to the 1976 Convention is issued, now scheduled for year-end 1975, it will not be possible to alter the number of delegates from each state. Relief for the 1976 Convention will be foreclosed unless, following remand, the District Court were disposed to impose a system of weighted voting, as the Second Circuit did in *Seergy* v. *Kings County Republican County Committee, supra.*

There is, nevertheless, an urgent need for declaratory and injunctive relief with respect to the party's victory bonus system. This case represents a continuing controversy which is "'capable of repetition, yet evading review.'" *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974) (and cases cited). For more than 40 years each Republican National Convention has adopted a delegate apportionment formula for the next convention which included a victory bonus system. The 1976 Convention is likely to do so for 1980. Since the primary responsibility for reapportionment lies with the malapportioned body, declaratory and injunctive relief with respect to the victory bonus system during the current Term is necessary to ensure that the 1976 Convention will have an opportunity to adopt a formula for the 1980 Convention which is consistent with the decision of this Court.

CONCLUSION

The decision below rejects the root principles of the reapportionment cases and leaves the law on delegate apportionment in utter confusion. The result makes a mockery of representative government.

For the reasons stated in the vacated division opinion by Chief Judge Bazelon and summarized here, Ripon respectfully requests that the Court grant this petition for *certiorari.*

Respectfully submitted,

ROBERT M. PENNOYER
THOMAS THACHER
PATTERSON, BELKNAP & WEBB
30 Rockefeller Plaza
New York, New York 10020

Counsel for Petitioners

Of Counsel:

GEORGE M. COBURN
WILLIAM J. MULLER